

IN THE SUPREME COURT OF MISSOURI

MICHAEL HOLMES,
Plaintiff-Respondent,

v.

COMMISSIONER SARAH STEELMAN and
ATTORNEY GENERAL ERIC SCHMITT,
Defendants-Appellants,

v.

MAYOR LYDA KREWSON, ET AL.,
Defendants-Respondents.

From the Circuit Court of the City of St. Louis, Missouri
The Honorable Joan L. Moriarty, Circuit Judge

SUBSTITUTE BRIEF OF APPELLANTS

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INTRODUCTION

Michael Holmes brought this declaratory action to determine whether the State of Missouri or the City of St. Louis must pay the \$2.5 million judgment he won in a federal lawsuit against two former St. Louis police officers. The Circuit Court for the City of St. Louis held that the State alone must indemnify the former officers through the State Legal Expense Fund (“SLEF”). In reaching this conclusion, however, the court applied the wrong version of the SLEF statute due to its conclusion that SLEF coverage is triggered by the conduct underlying a claim against a state official. But this logic contradicts this Court’s pronouncement in *Cates v. Webster* that SLEF coverage “arises when the claim is made.” 727 S.W.2d 901, 904 (Mo. banc 1987).

Under the version of the SLEF statute in effect in 2012, when Holmes filed his claim, the General Assembly had expressly excluded coverage for claims or judgments against “any police officer.” § 105.726.3, RSMo Cum. Supp. 2006. As such, Holmes is not entitled to recover on his judgment through the SLEF. Particularly in light of the potential impact this case may have on other pending and future SLEF claims, Appellants Sarah Steelman and Eric Schmitt (collectively, “the State”) respectfully request that this Court reverse the circuit court’s order and enter judgment in favor of the State.

JURISDICTIONAL STATEMENT

The State appeals from a declaratory judgment that the circuit court entered on cross-motions for summary judgment concerning the interpretation and application of the SLEF statute. *See* §§ 105.711–.726, RSMo. After the Court of Appeals, Eastern District, affirmed in ED106799, this Court granted the State’s application for transfer pursuant to Rule 83.04. Accordingly, this Court has jurisdiction under Article V, section 10, of the Missouri Constitution.

STATEMENT OF THE CASE

I. Statement of Facts

The following facts are undisputed by the parties and are consistent with the factual summary in the circuit court's order granting Holmes summary judgment against the State. *See* D151, pp. 2–4; Sub. App. 4–6.

A. Holmes was convicted on federal drug charges, but his sentence was vacated on the basis of new evidence.

In December 2003, Holmes was arrested after officers of the St. Louis Metropolitan Police Department (“SLMPD”) found cocaine base at his grandmother’s home. D116, pp. 5, 11; D120, pp. 1–2. According to then-SLMPD officers Shell Sharp and Bobby Lee Garrett, Holmes had engaged in apparent drug transactions in front of the residence and was found in possession of cocaine base inside the home. D120, pp. 1–2. Based in part on their testimony, Holmes was convicted on two counts of federal drug crimes. D100, p. 3, ¶ 5; D118, p. 8; D120, p. 1. He was then sentenced to twenty years’ imprisonment due to a prior drug-trafficking conviction. D100, p. 3, ¶ 5; D120, p. 1.

A subsequent SLMPD investigation into Sharp and Garrett uncovered misconduct, including evidence fabrication in other cases. D120, pp. 4–5. Citing this new information, Holmes moved to vacate his sentence. D120, p. 1. In 2011, a federal court granted his motion to vacate because Sharp and Garrett’s testimony had been discredited. *Holmes v. United States*, No. 4:08–CV–1142 (CEJ),

2011 WL 4445702, at *6 (E.D. Mo. Sept. 26, 2011); D119, pp. 1–2; D120, p. 6. But the same federal judge also denied Holmes’s motion for a certificate of innocence in light of untainted record evidence that indicated his guilt. *Holmes*, 2015 WL 6702269, at *2 (E.D. Mo. Nov. 3, 2015). In the end, prosecutors opted to not retry the case, and the indictment was dismissed. *Id.*

B. Holmes sued for damages related to his arrest and prosecution and won \$2.5 million.

In December 2012, Holmes brought a federal civil-rights action against Sharp, Garrett, and various St. Louis City officials, claiming, *inter alia*, that the former officers caused him to be wrongfully arrested and prosecuted. D78, p. 4, ¶ 13; D121. The Missouri Attorney General’s Office (“AGO”) provided separate representation to Sharp, Garrett, and the other defendants in the case. D122, p. 1. The district court ultimately dismissed all claims against the City defendants but allowed the claims against Sharp and Garrett to proceed to trial. *Holmes v. Slay*, 895 F.3d 993, 997 (8th Cir. 2018).

After the district court excluded evidence of Holmes’s prior drug-trafficking conviction, the jury returned a verdict for Holmes and awarded him \$2.5 million in damages. *Id.*; D124, pp. 1–2. The district court entered judgment on March 4, 2016. D126. Sharp and Garret appealed on several grounds, but the Eighth Circuit affirmed. *Holmes*, 895 F.3d at 1004; D126.

Less than a week after the entry of judgment, and before an appeal could be filed, Holmes demanded payment of his award through the SLEF. D105, p. 1. The State rejected the request. D106, p. 1. In doing so, the State explained that two provisions of the SLEF statute precluded payment of the judgment against the former officers. D106, pp. 1–2 (citing § 105.726.3 & .5, RSMo).

II. Statutory Context

In 1983, the SLEF was created by statute to replace the Tort Defense Fund. *Cates*, 727 S.W.2d at 904 (quoting § 105.711, RSMo Cum. Supp. 1984). As relevant here, the SLEF statute provides that:

[m]oneys in the [SLEF] shall be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction against: . . . (2) Any officer or employee of the State of Missouri . . . [based] upon conduct arising out of and performed in connection with his or her official duties.

§ 105.711, RSMo. The SLEF statute has been amended several times since its original enactment—most notably, for present purposes, in 2005 and 2012.

A. 2005 Amendment: The General Assembly clarifies that claims against police officers are not covered by the SLEF.

The 2005 Amendment to the SLEF statute was the General Assembly’s reaction to *Smith v. State*, which addressed the question of whether SLEF coverage extended to the St. Louis Board of Police Commissioners (“the Board”) and its police officers. 152 SW.3d 275, 277 (Mo. banc 2005). “From 1983 when the SLEF was created until 2005, the City had continued to provide and pay

for legal representation for the Board and to pay any settlements or judgments it incurred.” *State ex rel. Hawley v. City of St. Louis*, 531 S.W.3d 602, 605 (Mo. App. E.D. 2017). In 2005, however, the *Smith* Court held that the Board and its officers were entitled to SLEF coverage because the Board was an “agency of the State.” *Id.* at 278–79. “That same year, in explicit response to *Smith*, the Missouri Legislature amended section 105.726 to limit (but not entirely eliminate) the Fund’s obligations to the [Board].”¹ *State ex rel. Koster v. Kan. City Bd. of Police Comm’rs*, 532 S.W.3d 191, 196 (Mo. App. W.D. 2017).

The most significant change was the addition of section 105.726.3, which made clear that SLEF coverage did not extend to police officers or the Board:

Moneys in the state legal expense fund shall not be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction ***against*** a board of police commissioners . . . including the commissioners, ***any police officer*** . . . or any other individual or entity acting or purporting to act on its or their behalf.

§ 105.726.3, RSMo Cum. Supp. 2006 (emphasis added); App. 33. Nevertheless, subsection 3 provided that the SLEF would “reimburse” the Board for payments made on otherwise-eligible claims, up to \$1 million per fiscal year. *Id.*

Also as part of the 2005 Amendment, the General Assembly made two other additions to section 105.726 to address related issues. First, subsection 4

¹ This reaction was not unexpected, given that a three-judge concurrence in *Smith* invited a legislative solution to “except either the [SMPLD] or the [Board] or both . . . [s]hould the general assembly find the result of [*Smith*] undesirable.” 152 SW.3d at 280–81 (Price, J., concurring).

provided that the AGO would represent the Board in defending otherwise-eligible claims upon request. § 105.726.4, RSMo Cum. Supp. 2006. Unlike other State agencies, however, the Board was to pay “fair compensation” for such representation. *Id.* And second, subsection 5 established procedural rules for post-*Smith* claims against the Board and its officers. *Sherf v. Koster*, 371 S.W.3d 903, 907 (Mo. App. W.D. 2012) (citing § 105.726.5, RSMo). Such claims would qualify for both full SLEF coverage and free representation, so long as they were tendered to the AGO prior to August 28, 2005—the effective date of the 2005 Amendment. *Id.* Otherwise, and moving forward, “claims against employees of [the Board] would not be covered by the Fund.” *Id.*

B. 2012 Amendments: The shift from state to local control of the SLMPD marks the end of reimbursement and representation.

In November 2012, Missouri voters passed Initiative Proposition A, which authorized the City of St. Louis to establish control over its own police force. *Hawley*, 531 S.W.3d 604. To this end, the adoption of Proposition A triggered a series of statutory changes. *Id.* at 604–05. Three of these reforms are relevant for understanding the circuit court’s ruling.

First, the adoption of Proposition A “led directly to the enactment of § 84.344. That statute gave the City the right to establish its own police force free from state control.” *Id.* at 604. It also provided that, upon assumption of local control, “the state-controlled Board was required to transfer to the City title and ownership of all its indebtedness and assets.” *Id.* Pursuant to this authority,

“the City passed Ordinance 69489, which provided for the establishment . . . of the City’s own police force.” *Id.* On September 1, 2013, “the City assumed control over the force, which included its acceptance of the responsibility, ownership, and liability as the [Board’s] successor-in-interest.” *Id.*

Second, the passage of Proposition A enacted § 84.345.2, which addresses how the transfer to local control would impact the reimbursement-and-representation scheme adopted in the 2005 Amendment. *Id.* at 605. As noted above, section 105.726 already prohibited direct coverage for police officers and the Board arising out of claims filed after August 28, 2005. The City’s assumption of control over the SLMPD had the effect of cutting off any prospective SLEF obligations. *Id.* However, “for all claims ‘arising out of actions occurring before the date of completion of the transfer’ to local control, the State [would] continue to provide legal representation . . . and continue to provide reimbursement through the SLEF under § 105.726.” *Id.* (quoting § 84.345.2, RSMo).

Third, the adoption of Proposition A resulted in an additional amendment to the SLEF statute “to carve out the Board from SLEF coverage.” *Id.* Most important in this respect was a revision to section 105.726.3, “pursuant to which the Board was no longer entitled to reimbursement through the SLEF for covered claims.” *Id.* at 605. Only the City of St. Louis, as the Board’s successor-in-interest, was entitled to reimbursement for past claims. *Id.* There were also tweaks in the wording of subsections 3 and 4 to reflect the shift to local control. *See Koster*, 532 S.W.3d 196 n.6.

C. Summary: SLMPD officers have been subject to four phases of the SLEF, depending on the timing of the underlying conduct, filing of the claim, and rendering of the judgment.

In sum, the SLMPD has operated under four distinct SLEF phases. First, prior to *Smith*, the City of St. Louis paid for all claims and judgments against the Board and provided legal representation (“Phase One”). *Hawley*, 531 S.W.3d at 604. Second, as a result of *Smith*, the Board and its officers became eligible for direct SLEF coverage and free legal representation (“Phase Two”). *Sherf*, 371 S.W.3d at 907. Third, after the 2005 Amendment went into effect, the SLEF no longer provided direct coverage to the Board or any police officer. *Hawley*, 531 S.W.3d at 605. However, the SLEF continued to reimburse the Board for the payment of otherwise-eligible claims, and the AGO would provide representation for fair compensation (“Phase Three”). *Id.* And lastly, for claims arising out of actions occurring after the City assumed control of the SLMPD in 2013, all SLEF obligations to the Board and its officers—including direct coverage, reimbursement, and representation—are extinguished (“Phase Four”). *Id.*

PHASE NO.	EFFECTIVE DATES	OVERVIEW
Phase One	Aug 1983 – Jan 2005	City pays all SLMPD judgments and provides legal representation
Phase Two	Jan 2005 – Aug 2005	SLEF provides coverage for the Board and SLMPD officers; AGO provides free representation
Phase Three	Aug 2005 – Sept 2013	SLEF expressly excludes coverage for the Board and SLMPD officers after <i>Smith</i> but provides limited reimbursement to the Board; AGO provides representation for “fair compensation”
Phase Four	Sept 2013 – present	All SLEF obligations to SLMPD extinguished for any actions arising after transfer to local control

III. Procedural History

After the State rejected Holmes’s demand for payment of his judgment against Sharp and Garrett, he brought this declaratory action to resolve whether the State or the City is responsible for paying. D78. Following limited discovery, the parties filed cross-motions for summary judgment. D97–D107 (the State); D108–D139 (Holmes); D140–D144 (the City). The circuit court heard argument on summary judgment in December 2017 and took the cross-motions under advisement. D77, p. 22.

On May 3, 2018, the circuit court issued its Order and Judgment. D151, pp. 10–11; Sub. App. 12–13. Because Holmes’s claims against Sharp and Garrett arose out of actions that occurred before the SLMPD transferred to local control, the court concluded that “the State is obligated to provide reimbursement through the SLEF.” D151, p. 10; Sub. App. 12. The court also suggested that the 2005 Amendment limited the SLEF’s obligations only with respect to claims and judgments against the Board, not police officers. D151, p. 9; Sub. App. 11. As a result, the court granted Holmes summary judgment against the State.

The State timely appealed. D77, p. 23; D152. On May 14, 2019, the Court of Appeals issued an opinion affirming the grant of summary judgment but on different logic. Slip Op. at 10; Sub. App. 23. Recognizing that the 2005 Amendment excluded SLEF coverage for “any police officer,” the court found that the “principal issue . . . is whether to apply the SLEF statute in effect in 2003, when the misconduct . . . occurred, or the statute as amended in 2005.” Slip Op. at 5; Sub. App. 18. The court held that the 2003 version of the SLEF

statute must apply because the officers were covered by the SLEF at the time of their misconduct. *Id.* at 7. But that holding ignores this Court’s pronouncement in *Cates* that SLEF coverage “arises when the claim is made and extends to the time when a judgment might be rendered.” *See* 727 S.W.2d at 904. In light of this conflict and the general interest and importance of the case for other SLEF coverage disputes, this Court granted the State’s application for post-opinion transfer.

POINT RELIED ON

- I. The circuit court erred in granting Holmes summary judgment because the State is entitled to judgment as a matter of law, in that SLEF coverage is not implicated until a claim is made, and by the time Holmes filed his claim in 2012, the SLEF statute expressly excluded coverage for "any police officer."**

§ 105.726, RSMo (post-2012 Amendments)

Cates v. Webster, 727 S.W.2d 901 (Mo. banc 1987)

Sherf v. Koster, 371 S.W.3d 903 (Mo. App. W.D. 2012)

ARGUMENT

- I. The circuit court erred in granting Holmes summary judgment because the State is entitled to judgment as a matter of law, in that SLEF coverage is not implicated until a claim is made, and by the time Holmes filed his claim in 2012, the SLEF statute expressly excluded coverage for “any police officer.”**

The circuit court granted Holmes summary judgment against the State because it misinterpreted and applied the wrong version the SLEF statute. In fact, the coverage dispute is straightforward when the SLEF statute is properly applied. Because “the protection provided [to] the employee under the Fund arises when the claim is made,” *that* date determines which version of the SLEF statute applies to a given claim for coverage. *See Cates*, 727 S.W.2d at 904. Thus, while the officers’ misconduct occurred in 2003, the SLEF scheme that was in place when Holmes filed his claim in 2012² is what matters for present purposes. In other words, SLEF Phase Three (reimbursement and representation but not direct coverage), *see supra* at 12, controls the Court’s analysis here.

² Indeed, Holmes could not have filed his federal civil-rights action much sooner than he did, as his cause of action did not accrue until his conviction was vacated in 2011. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) (holding that, to recover damages for a wrongful conviction, “a § 1983 plaintiff must prove that the conviction or sentence has been reversed”); *Anderson v. Franklin Cty.*, 192 F.3d 1125, 1131 (8th Cir. 1999) (finding that an arrestee’s false-arrest claims were properly dismissed, where the arrestee made no showing his conviction or sentence had been rendered invalid); *see also Branstad v. Kinstler*, 166 S.W.3d 134, 136 (Mo. App. W.D. 2005) (noting that the general law in Missouri is that there is no claim until the cause of action has accrued).

Section 105.726.3 expressly excludes coverage for claims or judgments against “any police officer.” § 105.726.3, RSMo.³ Accordingly, Holmes is not entitled to recover on his judgment from the SLEF (although the City might be entitled to reimbursement if it pays for the judgment). The circuit court’s opposite conclusion stems from two erroneous conclusions in interpreting and applying the SLEF statute: (1) that section 105.726.3 does not exclude SLEF coverage for police officers, D151, pp. 8–9; App. 8–9; and (2) that the post-2005 Amendment version of the SLEF statute did not apply to Holmes’s judgment. The Court should reverse both errors and enter summary judgment for the State.

A. Preservation and Standard of Review

The parties agree that no material facts remain in dispute and that the only issues on appeal are questions of law. The propriety of summary judgment was addressed extensively before the circuit court, both through the parties’ summary-judgment briefing and at a hearing on December 12, 2017. Thus, the State’s claim of error is fully preserved for appellate review.

“The right to summary judgment is solely an issue of law that does not require any deference to the trial court.” *City of St. Louis v. State*, 382 S.W.3d

³ The 2012 Amendments had gone into effect by the time Holmes filed his claim in December 2012, so the current version of section 105.726.3 is the correct version of the statute to apply. But even under the previous version adopted in the 2005 Amendment, the relevant language concerning claims or judgments against any police officer was the same. *See* § 105.726.3, RSMo Cum. Supp. 2006.

905, 910 (Mo. banc 2012) (citation omitted). “Because the facts are not in dispute, and the only issues are matters of law, appellate review is *de novo*.” *Smith*, 152 S.W.3d at 277 (citation omitted). “Under Rule 84.14 an appellate court may reverse the judgment of the trial court and ‘give such judgment as the court ought to give.’” *City of DeSoto v. Nixon*, 476 S.W.3d 282, 286 (Mo. banc 2016).

“The determination of whether the [SLEF] is applicable to [Holmes’s] case is a matter of statutory interpretation.” *Sherf*, 371 S.W.3d at 907. “Interpreting a statute and determining whether it applies to a given set of facts are questions of law which this court reviews *de novo*.” *See id.* (citation omitted). “The seminal rule of statutory construction is to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning.” *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 665 (Mo. banc 2010) (citation omitted). “To discern legislative intent, the Court may review the earlier versions of the law, or examine the whole act to discern its evident purpose, or consider the problem that the statute was enacted to remedy.” *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. banc 2009) (quotation omitted).

B. The trial court erred in interpreting section 105.726.3 to exclude SLEF coverage for only the Board, and not “any police officer,” as the statute expressly provides.

The circuit court erred in concluding that the 2005 Amendment (and subsequent versions of the SLEF statute) did not exclude coverage for

individual police officers. The court found that “§105.726.3 RSMo . . . clearly states that it applies *only* to judgments ‘against a board of police commissioners.’” D151, p. 8; Sub. App. 10 (emphasis added). As such, the court held that subsection 3 “does not limit the SLEF’s obligations with respect to the judgment at issue.” D151, p. 9; Sub. App. 11. This holding is incorrect for at least three reasons.

First, the circuit court’s interpretation cuts against the plain text of the subsection 3, which, since the 2005 Amendment, has clearly provided:

Moneys in the state legal expense fund shall not be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction ***against*** a board of police commissioners established under chapter 84, including the commissioners, ***any police officer*** . . . or any other individual or entity acting or purporting to act on its or their behalf.

§ 105.726.3, RSMo (emphasis added); *see also* § 105.726.3, RSMo Cum. Supp. 2006 (same). The circuit court did not explain its rationale for reading beyond “a board of police commissioners,” but presumably, it inferred that the phrase “including the commissioners” broke the list of coverage exclusions, thereby limiting it to the Board. The better reading of “including the commissioners” is an appositive modifier of “a board of police commissioners,” as in, “a board of police commissioners . . . including the commissioners [themselves].” This also makes practical sense, given that most lawsuits against the police boards are brought against the commissioners. Under this interpretation, “against” would modify “a board of police commissioners,” “any police officer,” and the other individuals on the list.

But even if “including” is treated as distributive, as the circuit court seemingly suggests, it only makes sense to apply the coverage exclusion to all of the parties in the list, including the police officers. Otherwise, plaintiffs wanting the benefits of SLEF coverage would learn to simply not name the Board as a party, which would render the entire provision a nullity. *See Bd. of Registration for Healing Arts v. Boston*, 72 S.W.3d 260, 265 (Mo. App. W.D. 2002) (holding that “[c]ourts must give effect to statutory language as written,” giving meaning to every word without rendering any provision a nullity (citing *Spradlin v. City of Fulton*, 982 S.W.2d 255, 261 (Mo. banc 1998))). Thus, however “including the commissioners” is read, the plain language of subsection 3 excludes SLEF coverage for “any police officer.” *See Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013) (“When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.”).

Second, although the legislative intent is clear from the plain words of subsection 3, the circuit court should have “consider[ed] the problem that the statute was enacted to remedy” to the extent it found the provision ambiguous. *See Unnerstall*, 298 S.W.3d at 519. As explained above, section 105.726.3 expressly explains that the General Assembly enacted the 2005 Amendment in response to the *Smith* Court’s holding that the Board *and its police officers* were entitled to SLEF coverage. *See Smith*, 152 S.W.3d at 279 (“As officers of the state, [SLMPD officers] are covered by the SLEF.”). In light of this explicit

purpose, the General Assembly would have specified any portion of the *Smith* decision that it wanted to remain in effect. However, it chose not to do so, and as such, the provision should be interpreted accordingly.

Third, applicable precedent compelled the conclusion that subsection 3 excludes SLEF coverage for “any police officer.” Most significantly, the Court of Appeals already provided controlling guidance on this exact question: “Among the 2005 amendments to the Fund, the legislature created an exception to Fund coverage for employees of police boards, such as [Sharp and Garrett].” *See Sherf*, 371 S.W.3d at 906. Additionally, because the SLEF statute “amount[s] to a partial waiver of the sovereign immunity applicable to the state . . . it is to be strictly construed” in favor of immunity. *P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 810 (Mo. App. W.D. 2011); *see also F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) (“Any ambiguities in the statutory language [or in the scope of a waiver] are to be construed in favor of immunity.”). Thus, for all of these reasons, the circuit court erred in concluding that section 105.726.3 does not exclude SLEF coverage for “any police officer.”

C. The trial court erred in analyzing SLEF coverage by focusing on when the underlying misconduct occurred rather than when Holmes made his claim, as this Court held in Cates and as the SLEF statute clearly provides.

The circuit court also held that the timing of Sharp and Garret’s underlying misconduct was dispositive as to question of SLEF coverage.

Specifically, the court looked to one of the provisions enacted by Proposition A, which authorized the SLMPD to shift to local control. According to the court:

Section 84.345.2 RSMo, like the amendment to §105.726.3, provides that for all claims “arising out of actions occurring before the date of completion of the transfer” to local control, the State shall continue to provide legal representation as set forth in §105.726, and must continue to provide reimbursement through the SLEF for such claims under §105.726.

D151, p. 10; Sub. App. 12 (quoting § 84.345.2, RSMo). Because Holmes’s claims “arose out of actions occurring in 2003,” the court reasoned, “the State is obligated to provide reimbursement through the SLEF.” *Id.* Yet this conclusion directly contradicts applicable precedent and the SLEF statute itself.

As an initial matter, it is simply not true that the 2005 Amendment adopted the “arising out of actions” standard found in section 84.345.2. In fact, the word “action” does not appear anywhere in section 105.726. But the most glaring defect in the circuit court’s analysis is that it confuses “coverage” under the SLEF with “reimbursement.” The court was correct in observing that section 84.345 ties ongoing SLEF *reimbursement* and representation for the SLMPD to the date of the underlying conduct; actions arising before transfer to local control operate under Phase Three and those occurring after operate under Phase Four.⁴ However, the court overlooked the fact that the SLEF

⁴ In fact, this framework is why the AGO provided representation to Sharp, Garrett, and the Board in the federal civil-rights case and also why it billed for representation. See *Hawley*, 531 S.W.3d at 608(explaining that, under section 105.726.4, the Board or its successor must “fairly compensate the AGO”).

statute has always tied *coverage* to the filing of a claim or the rendering of a judgment against covered state employees. *See* § 105.711.2, RSMo 2000 (“Monies in the [SLEF] shall be available for the payment of any claim or any amount required by any final judgment.” (emphasis added)); § 105.711.2, RSMo Cum. Supp. 2006 (same). Indeed, as this Court made clear in *Cates*, “the protection provided [to] the employee under the Fund arises when the claim is made and extends to the time when a judgment might be rendered.” 727 S.W.2d at 904; *see also Sherf*, 371 S.W.3d at 907 (analyzing the claim-or-judgment standard from *Cates* in light of the 2005 Amendment).

Eliding the critical distinction, the circuit court unduly focused on section 84.345, which is irrelevant to the present matter. Yet, even ignoring the difference between coverage and reimbursement, the court’s analysis still fails. Section 84.345.2 tethers the ongoing availability of SLEF reimbursement and fee-based representation to the terms of section 105.726. *See* § 84.345.2, RSMo (“[T]he state shall continue to provide legal representation *as set forth in section 105.726* and the [SLEF] shall continue to provide reimbursement for such claims *under section 105.726*.” (emphasis added)). In doing so, the General Assembly necessarily incorporated any limitations to reimbursement provided in section 105.726. As explained above, section 105.726 expressly excludes coverage for any claim or judgment against “any police officer” filed after the effective date of the 2005 Amendment. *See* § 105.726.3 & .5, RSMo. And this cross-referenced limitation makes good sense; after all, Proposition A was

passed to enable the City to take control over the SLMPD, not to reverse the exclusion of SLEF coverage adopted in the wake of *Smith*.

Therefore, the circuit court erred in its conclusion that the timing of Sharp and Garret's underlying misconduct was dispositive as to question of SLEF coverage.⁵ When viewed under the proper claim-or-judgment standard set out in *Cates*, it becomes clear that Holmes's judgment against the former officers falls under SLEF Phase Three, and as a result, the State is not required to provide reimbursement or indemnification.

⁵ The Court of Appeals also rejected the State's interpretation of the SLEF statute, citing concerns that it would render the law unconstitutionally retrospective. Slip Op. at 6; Sub. App. 19. This conclusion likewise rests on the premise that SLEF coverage is triggered when the underlying conduct occurs. As explained above, however, "protection" for former employees such as Sharp and Garrett, "arises when the claim is made." *Cates*, 727 S.W.2d at 904. Holmes made his claim in 2012. Accordingly, coverage had not vested before the 2005 Amendment, and applying the post-2005 SLEF statute does not constitute a violation of Article I, section 13 of the Missouri Constitution.

CONCLUSION

For the foregoing reasons, Appellants respectfully ask this Court to reverse the circuit court's order and enter judgment in favor of the State.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on October 16, 2019, the forgoing brief was filed through the Missouri CaseNet e-filing system, which will send notice to all counsel of record. I also certify that this brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 5,804 words.

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